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CLERK

80-1732
No.

In The

Supreme Court of the United States

MAY TERM 1981

DAVID H. GUST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

DAVID H. GUST
399 Parma Center Road
Hilton, New York 14468
Telephone: (716) 722-1665

QUESTIONS PRESENTED

1. Whether the petitioner received a fair trial and was convicted with truthful evidence.

2. Whether the IRS notice to the taxpayer indicated a rejection of petitioner's return.

3. Whether the petitioner's tax return accepted initially by the IRS was, as a matter of law, a return. Stated another way, when does a tax form become a tax return.

4. Whether the law is clear and interpretations are consistent.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

David H. Gust Petitioner herein pray that a Writ of Certiorari issue to review the judgment entered by the United States Court of Appeals for the Second Circuit on March 2, 1981 affirming the judgment of the United States District Court for the Western District of New York.

OPINION BELOW

The United States Court of Appeals for the Second Circuit found as a matter of fact that Petitioner was not "trapped" as a result of the Service's (IRS) notification in response to his 1975 "return". Further the returns failed to provide any basis upon which appellant's tax liability could be computed. Other argu-

ments are equally without merit. Judgment Affirmed. See Appendix A-1.

JURISDICTION

Jurisdiction of this Court is invoked under Title 26 USC 1254 (1)

QUESTIONS PRESENTED

1. Whether the petitioner received a fair trial and was convicted with truthful evidence.

2. Whether the IRS notice to the taxpayer indicated a rejection of petitioner's return.

3. Whether the petitioner's tax return accepted initially by the IRS was, as a matter of law, a return. Stated another way, when does a tax form become a tax return.

4. Whether the law is clear and interpretations are consistent.

STATEMENT OF THE CASE

Petitioner seeks review of the Judgment of the United States Court of Appeals for the Second Circuit entered on March 2, 1981, affirming the conviction entered in the United States Court for the Western District of New York. On July 24, 1980, after a three-day trial, the jury found petitioner guilty of three counts of willful failure to file individual tax returns for the calendar years 1975, 1976 and 1977 in violation of Title 26, USC 7203. Petitioner was also found guilty of willfully filing false withholding statements in violation of Title 26 7205 for 1976, 1977, and 1978.

On October 14, 1980, Judge Burke sentenced petitioner to 6 months and 1 day for each count and $1,000.00 for each count of willfully failing to file a tax return.

STATEMENT OF FACTS

Petitioner filed his 1975 Federal Income Tax at the IRS Service center at Andover, Mass. The Tax authorities at Andover received the return, reviewed it, computed the tax from the information on the return and sent a notice to the petitioner entered as evidence and shown as A-1 in the Addendum to this petition. That official response to the filing of petitioner's return never indicated the return was unacceptable or that further action was needed. To the contrary, the bottom line of the official notice clearly states in bold letters

THIS NOTIFICATION REQUIRES NO ACTION BY YOU.

Acting on the information the IRS supplied, in an unsolicited manner, petitioner took no action nor did petitioner have any reason to make any changes in his relationship with the IRS. On March 25, 1980, the U.S. Attorney repudiated that official document by filing a six count information clearly stating much action should have been taken. The information charged that the return accepted for 1975 was not a return at all and petitioner was a criminal for not filing it. Additionally the returns petitioner had filed for 1976 and 1977 were not returns and this was all in criminal violation of Federal Law. Furthermore there were three counts of willfully filing false withholding certificates with petitioner's employer for 1976, 1977, and 1978. During the trial it was shown that petitioner had been deceived by David Fields who, as a warrant agent, acting in a position of created authority and under color or law, attempted to defraud petitioner out of $950.00 in the name of taxes. Answering a complaint filed by petitioner the Tax Officials confessed they used fictitious names in these matters. See Appendix A-5 and A-6. As a consequence of filing a valid complaint against a tax official, at least the name of one who pretended to be, petitioner is labeled a protestor and has been prosecuted.

In obtaining a conviction the prosecutor had admitted, as evidence to the jury, information that was contrary to the truth as the government knew it to be. Contrary to the computation of petitioner's tax as done by the IRS, the Appeals Court found no basis for computing a tax from the return filed. However, the Appeals Court did state their opinion was not formal and shall not be cited or otherwise used in unrelated cases.

POINT I

A citizen of the United States of America is denied a fair trial with truthful evidence when the Government submits, as evidence to the jury, information that is contrary to the Government's knowledge of the matter.

To verify petitioner's contributions for the years in question, the Government issued subpoenas to some of the organizations petitioner supported as evident in Appendix A-7 through A-9 and summed as follows:

1975	1976	1977
$2,820.00	$2,175.25	$2,878.00

However, the calculated petitioner's taxes showing contributions misrepresented as evident in Appendix A-11.

1975	1976	1977
$170.00	$208.00	$142.00

To argue the subpoenaed information was not essential as evidence in computing petitioner's tax liability is to accuse the Government of issuing vain and useless subpoenas. Furthermore, this technique of withholding in excess of 90% of the known entries in a given category is not allowed to the taxpayer. Since it is a settled point of law that a wrongful act is determined by the nature of the act and not the identity of the actor, petitioner urges this Court to forcefully strike down this wrongful action and the convictions obtained from it just as it did in the landmark case of the Miranda decision. *Miranda v Arizona*, 342 US 436.

POINT II

The courts cannot require the taxpayer to act in compliance with official notices from the Internal Revenue Service and then turn on the taxpayer for doing so.

After the petitioner's tax return was received at the service center at Andover Mass., the tax authorities reviewed the return, computed a tax liability from the information on the return and sent the petitioner a notice showing the results of their calculations. The United States Court of Appeals for the Second Circuit erred on this point finding:

> (petitioner) "failed to provide any basis upon which appellant's tax liability could be computed, and hence failed to satisfy the minimum standard for "returns" within the meaning of §7203 of the Internal Revenue Code."

The official notice issued in response to receiving petitioner's tax return shows the Internal Revenue Service computed petitioner's tax return, by their own choice, and notified petitioner of the official action taken by the Internal Revenue Service as a result of receiving petitioner's tax return. Furthermore, the bottom line of the official notice from the Internal Revenue Service clearly states in bold capital letters,

THIS NOTIFICATION REQUIRES
NO ACTION BY YOU.

Petitioner respectfully submits there is no reasonable interpretation of the official statement above that can be construed to mean;

> "we have rejected your return and you must take action to file an acceptable return."

The plain language of the official notice to this petitioner clearly and unambiguously declares nothing is lacking which requires immediate attention! Even if the Internal Revenue Service was wrong in issuing their official notice to the

petitioner, which they were not, petitioner had no reason to believe his return had been rejected. Subsequent returns were filed and never did the Internal Revenue Service ever hint to this petitioner that the official notice was no longer valid. Even if the official notice to this petitioner were to be determined to be in error, ex post facto, that would not make the party relying on that official notice a criminal ex post facto. United States Constitution, Article I, Section 9, paragraph 3.

POINT III

In computing a tax liability from the information on the petitioner's return, the Internal Revenue proved it was a return thereby requiring no action by petitioner.

In *United States v. Porth*, 426 F.2d 519, 523 (10th Cir. 1970) the Court stated:

> a form that does not contain sufficient information on which a tax liability can be computed is not a return.

That being valid as a definition of a return then

> a form that does contain sufficient information on which a tax liability can be computed is a return.

The value of this definition is its simplicity and its mathematical irrefutability. It does not turn on intent or interpretation. This point is well supported in *United States v. Long*, 618 F.2d 74 (9th Cir 1980). Long had entered zeros in various places on his tax return. In reversing Long's conviction for willful failure to file (26 USC 7203) the Appeals Court stated:

> "The IRS could calculate assessments from Long's zeros just as it could if Long had entered other numbers."

Although the IRS had not calculated an actual tax liability in the Long case as the IRS did in this case, the Court properly stated it could have been done. As a high school student knows, zeros, like whole positive integers, have specific value. In our

check book, zeros tell us something. In this case the numbers were whole positive integers and the action of the Internal Revenue Service in sending their official notice to the petitioner was both proper and in good faith.

POINT IV

A law so vague and ambiguous that men of good faith reach differing conclusions as to what is required or what is prohibited is no law at all, it creates no office, establishes no authority, settles no disputes, and leaves the parties where it found them. It is void not from the date of its being declared so, but from the date of its inception. 16 Am Jur 2d Sec. 177

Whereas the official notification sent to this petitioner from the Internal Revenue Service is soundly based on the reasoning of Long in defining a tax return, there is direct and total disagreement in the Circuit Courts.

In *United States v. Smith*, 618 F.2d 280 (5th Cir. 1980), this Court squarely contradicts Long on the definition of the return. Although it is laymen who are required to file a return, it is experts who cannot agree on what the return is.

SUMMARY

While there are direct Judicial contradictions of the definition of the return petitioner was criminally convicted of willfully failing to file, one critical and controlling point emerges without challenge. Petitioner never voluntarily violated the law he was convicted of violating. It is an absolute certainty that filing a "return," whatever that may be, is not a voluntary act. Like death itself, filing a tax return is a compelled matter over which petitioner does not exercise a free and unfettered choice. Nor was this petitioner entitled to a preliminary hearing on any of the charges. Instead petitioner was forced, without aid of legal counsel, into an uncharted sea of legality, and has been ship-

wrecked on the hidden shoals of conflicting information and opinion from both the Internal Revenue Service** and the Judiciary itself.

CONCLUSION

For all the foregoing reasons petitioner respectfully urges this Court to review this matter and issue clear and unambiguous definitions that will settle the contradictions within the Circuits and relieve the people from criminal prosecution based on the taxpayers reliance on information the IRS provides.

Respectfully submitted,

DAVID H. GUST
399 Parma Center Road
Hilton, New York 14468
Telephone: (716) 722-1665

**Petitioner has served notice on the Commissioner of the Internal Revenue demanding specifications, from the Commissioner, that will constitute an "acceptable" return. The lack of the courtesy of even an acknowledgement of receiving the notice may indicate the Tax Authorities prefer prosecution to cooperation.

APPENDIX

ORDER OF UNITED STATES COURT OF APPEALS SECOND CIRCUIT DATED MARCH 2, 1981

UNITED STATES COURT OF APPEALS
Second Circuit

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

a Stated Term of the United States Court of Appeals, in and for the Second Circuit, the United States Court House, in the City of New York, on the 2nd March, one thousand nine hundred and eighty-one.

PRESENT:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE JAMES L. OAKES
Circuit Judge

HONORABLE EDWARD R. NEAHER*
District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID H. GUST,

Defendant-Appellant.

80-1412

Appeal from the United States District Court for the Western District of New York.

---

*United States District Judge for the Eastern District of New York, sitting by designation.

Order of the United States Court of Appeals
Second Circuit dated March 2, 1981

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by appellant pro se and by counsel for appellee.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

David H. Gust appeals from a judgment of conviction following a jury trial before Judge Harold P. Burke in the United States District Court for the Western District of New York. Gust was found guilty of three counts of failure to file a valid tax return, in violation of 26 U.S.C. §7203, and three counts of supplying false information to his employer concerning tax exemptions, in violation of 26 U.S.C. §7205.

He was sentenced to a term of imprisonment of six months and one day on each count, to be served concurrently, and fined $1,000 on each of the three counts charging violation of 26 U.S.C. §7203.

We find no merit in appellant's argument that he did file valid tax returns for the years 1975, 1976, and 1977. These "returns," with their "figures[s] expressed in Constitutional dollars of gold and silver" and their assertion of "objection self-incrimination," failed to provide any basis upon which appellant's tax liability could be computed, and hence failed to satisfy the minimum standards for "returns" within the meaning of §7203 of the Internal Revenue Code. See, e.g., United States v. Porth, 426 F.2d 519, 523 (10th Cir.), cert. denied, 400 U.S. 824 (1970). Appellant's reliance on United States v. Long, 618 F.2d 74 (9th Cir. 1980), is of no avail, because in that case the returns alleged to have been filed had zeros in the entries for income, exemptions, and so forth, thereby providing a basis for the calculation of tax.

Order of the United States Court of Appeals
Second Circuit dated March 2, 1981

In any event, we express no view as to the soundness of the decision in *Long*.

We also reject appellant's contention that he was "trapped" as a result of the Service's notification, in response to his 1975 "return," that he had no tax liability for that year and that the notification "requires no action by you." Appellant claims he was entitled to rely on this notification as a form of approval of his "return," justifying his submission of similar "returns" in 1976 and 1977. The issue of appellant's good-faith reliance was adequately presented to the jury in the judge's charge with respect to wilfulness, a charge in which we find no reversible error.

We have considered appellant's other arguments and find them equally meritless. Accordingly, the judgment of conviction is affirmed.

/s/ WILFRED FEINBERG
Wilfred Feinberg, Chief Judge

/s/ JAMES L. OAKES
James L. Oakes, Circuit Judge

/s/ EDWARD R. NEAHER
Edward R. Neaher, District Judge

UNITED STATES COURT OF APPEALS
FILED
MAR 2 1981
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

OFFICIAL NOTICE FROM IRS

Department of the Treasury
Internal Revenue
Service Center

ANDOVER, MA. 01812
AU 7618

DAVID H. GUST
399 PARMA CTR RD
HILTON NY 14468

Date of This Notice
MAY 17, 1976
Taxpayer Identifying Number
050-30-2998
Document Locator Number
16211-108-30974-6
Form Number
1040
Tax Period Ended
DEC. 31, 1975

NOTICE TO TAXPAYER

WE COMPUTED YOUR TAX BASED ON THE INFORMATION YOU FURNISHED ON YOUR FORM 1040.
HERE IS OUR REPORT – THE FIGURES SHOWN AT THE RIGHT.

THIS INFORMATION IS FOR YOUR RECORDS. – THIS IS NOT A BILL.

THIS NOTICE IS NOT THE RESULT OF AN AUDIT OF YOUR RETURN. WHEN WE SELECT A RETURN FOR AUDIT, WE NOTIFY THE TAXPAYER.

TAX COMPUTATION

YOUR TOTAL INCOME TAX	$.00
TAX WITHHELD BY YOUR EMPLOYERS	$.00
OTHER TAX YOU PAID	.00
TOTAL CREDIT FOR PAYMENTS MADE	.00
REFUND	NONE

–THIS NOTIFICATION REQUIRES NO ACTION BY YOU–

AFFIDAVIT OF ROBERT T. MULIG

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID H. GUST,

Plaintiff,

against

DAVID FIELDS,

Defendant.

CIVIL ACTION FILE
NO. 79-16

STATE OF NEW YORK }
COUNTY OF ALBANY } SS.:

AFFIDAVIT

ROBERT T. MULIG, being duly sworn, deposes and says:

1. I am an Assistant Attorney General on the staff of Robert Abrams, Attorney General of the State of New York, attorney for the defendant herein. I make this affidavit in opposition to plaintiff's motion for summary judgment. I have been assigned this matter from the outset and I am fully familiar with the facts and circumstances.

2. As I stated on February 12, 1979 at oral argument of the related case of *Gust* v. *Connors*, the defendant David Fields was not personally served nor could he be so served. I am advised by the Tax Compliance Bureau that this defendant's name is fictitious and is used to identify particular forms mailed to taxpayers in order to facilitate handling of correspondence when a reply is received.

AFFIDAVIT OF ROBERT T. MULIG

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID H. GUST,

Plaintiff,

against

RONALD BRADSHAW, JR.,

Defendant.

CIVIL ACTION FILE
NO. 78-826

STATE OF NEW YORK }
COUNTY OF ALBANY } SS.:

AFFIDAVIT

ROBERT T. MULIG, being duly sworn, deposes and says:

1. I am an Assistant Attorney General on the staff of Robert Abrams, Attorney General of the State of New York, attorney for the defendant herein. I make this affidavit in opposition to plaintiff's motion for summary judgment. I have been assigned this matter from the outset and I am fully familiar with the facts and circumstances.

2. As I stated on February 12, 1979 at oral argument of the related case of *Gust* v. *Connors*, the defendant Ronald Bradshaw, Jr., was not personally served nor could he be so served. I am advised by the Tax Compliance Bureau that this defendant's name is fictitious and is used to identify particular forms mailed to taxpayers in order to facilitate handling of correspondence when a reply is received.

VERIFICATION OF CONTRIBUTIONS

District Director
Internal Revenue Service
Attn: Mr. William Schirmer:

Dear Sir:

The following is a list of the amounts and the dates of the contributions made by Mr. David H. Gust to Camp Cherth of W.N.Y.

/s/ RICHARD C. MAYO
Treasurer

1975	$140.00
1976	$130.00
1977	$120.00
Total	$390.00

HCJB

August 8, 1978

Mr. William R. Schirmer
Intelligence Division
Internal Revenue Service
100 State Street
Rochester, New York 14614

Dear Mr. Schirmer:

Re: David H. Gust
Hilton, New York 14468

In reply to your letter of August 2, enclosed from our computer history records are detail lists of check contributions showing date, receipt number, amount, account credited, and account name for 1975, 1976, and 1977, viz.

1975	Total	$390
1976	Total	390
1977	Total	360

Relative to contributions in a form other than cash or check, we

find no record of having issued to Mr. Gust an "Official Memo Receipt" from this office.

Sincerely yours,
/s/ A.E. ERICSON
Arthur E. Ericson
Assistant treasurer

AEE/lft

Enclosures

BRIGHTON COMMUNITY CHURCH
420 WINTON ROAD NORTH
ROCHESTER, NEW YORK
AREA CODE 716 - 482 - 6069

Dr. W. Millar Crawford, Pastor
Theodore S. Brewer, Assistant Pastor
David P. Blackmore, Dir. of Christian Ed.
John D. Zimmerman, Church Administrator

August 25, 1978

Mr. William R. Schirmer,
Special Agent
Dept. of Treasury
100 State St.
Rochester NY 14614

Dear Sir:

Enclosed are copies of statements of contributions issued to Mr. & Mrs. David Gust for the years of 1976 and 1977. I cannot produce such a statement for 1975. However, I have reconstructed, from what information I have available, a partial statement for that year. Work sheets for the last two months and the copies of the annual statements are missing. I fear they were lost when part of the basement was flooded during last spring's thaw.

Verification of Contributions

We have no specific records as to non-cash contribution, but Mr. Gust has felled several large trees on the churches new property.

Sincerely,
/s/ JOHN D. ZIMMERMAN
John D. Zimmerman
JDZ:pt
Enc.

1975 Total $2,050.00
1976 Total $1,505.25
1977 Total $1,971.00

YOUTH FOR CHRIST CAMPUS LIFE
GREATER ROCHESTER
150 WINTON ROAD NORTH
(716)482-7540

August 18, 1978

Mr. William R. Schirmer
Department of the Treasury
100 State St.
Rochester, N.Y. 14614

Dear Mr. Schirmer:

The following is a list of all contributions that our records show were made to us in the years 1975, 1976, and 1977 by David H. Gust, 399 Parma Center Rd., Hilton, N.Y., in answer to your request of 8/2/78.

1975 Total $240.00
1976 Total $290.00
1977 Total $655.00

I hope I have given you all the information you need, and that it will be helpful to you.

Sincerely,
/s/ KAREN E. ANDREWS
Karen E. Andrews
Financial Secretary

ITEMIZED DEDUCTIONS

	1975	1976	1977	1978	
MEDICAL EXPENSE					
1 ½ of insurance premium	61.24	95.94	123.19	131.74	Eastman Kodak G20, G21, G22, G23
2 Medicine & Drugs	—	—	—	—	
3 1% of Adjusted Gross Income	220.53	227.01	231.95	257.21	
4 Subtract Line 3 from Line 2	—0—	—0—	—0—	—0—	
5 Enter balance of insurance premium	61.24	95.94	123.19	131.74	
6 Other Medical Expenses	—	—	—	—	
7 Total (Lines 4, 5 and 6)	61.24	95.94	123.19	131.74	
8 3% of Adjusted Gross Income	661.59	681.03	695.86	771.63	
9 Subtract Line 8 from Line 7	—0—	—0—	—0—	—0—	
10 Total of Lines 1 thru 9	61.24	95.94	123.19	131.74	
TOTAL MEDICAL					
TAXES					
State Income Tax	663.85	188.28	139.76	137.59	Eastman Kodak G20, G21, G22, G23
General Sales Tax	356.00	363.00	363.00	363.00	PER TABLES
TOTAL TAXES	1,019.85	551.28	502.76	500.59	

ITEMIZED DEDUCTIONS (Continued)

CONTRIBUTIONS					
Community Chest	170.00	208.00	142.00	40.00	Eastman Kodak G20, G21, G22, G23
Medical	61.24	95.94	123.19	131.74	
Taxes	1,019.85	551.28	502.76	500.79	
Contributions	170.00	208.00	142.00	40.00	
TOTAL ITEMIZED DEDUCTIONS	1,251.09	855.22	767.95	672.53	
LESS: ZERO BRACKET AMOUNT			1,600.00	1,600.00	
EXCESS ITEMIZED			–0–	–0–	

COMPUTATION OF GROSS INCOME AND TAX DEFICIENCY OF DAVID H. GUST

	1975	1976	1977	1978	REFERENCE
Gross Wages	19,170.19	19,811.40	20,400.00	22,958.60	Eastman Kodak G-20, G-21, G-22, G-23
Bonus	2,882.78	2,889.69	2,795.24	2,751.87	Eastman Kodak G-20, G-21, G-22, G-23
Interest Income				10.38	1978 1040 Document G-15
Gross Income	22,052.97	22,701.09	23,195.24	25,720.85	
Less: Adjustments to Income	—0—	—0—	—0—	—0—	
Adjusted Gross Income	22,052.91	22,701.09	23,195.24	25,720.85	Schedule 1
Less: Itemized Deduction					
Standard Deduction	1,300.00	1,400.00	*	*	
Exemptions	1,500.00	750.00	750.00	750.00	
Taxable Income	19,252.97	20,551.09	22,445.24	24,970.85	
Tax	(A)5,069.14	(B)6,041.00	(C)6,475.72	(D)7,715.43	
Less: Credit for personal expemptions	60.00	90.00	35.00	35.00	
Tax Liability	5,009.14	5,951.00	6,440.72	7,680.43	
Less: withholding on wages	1,654.35	32.74	149.30	—0—	Eastman Kodak G-20, G-21, G-22, G-23
withholding on bonus	576.56	577.94	559.05	550.37	Eastman Kodak G-20, G-21, G-22, G-23
Tax Due	2,778.23	5,340.32	5,732.77	7,130.06	

COMPUTATION OF GROSS INCOME AND TAX DEFICIENCY OF DAVID H. GUST (Continued)

(A) Computed on Schedule G — using Tax Rate Schedule Y — married filing separately

(B) Computed on Schedule G — using Tax Rate Schedule Y — married filing separately

(C) Used Schedule Y — married filing separately

(D) Used Schedule Y — married filing separately

* Zero Bracket Amount of 1600 — included in Tax Rate Schedule Y